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Supreme Court, U.S.
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No. 95-1184

In the Supreme Court CLERK

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO
FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Federal Circuit**

**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

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QUESTIONS PRESENTED

1. Should this Court review whether USDA's forcing only California nectarine, peach and plum growers to fund a "generic" (without brand credit) advertising program (run by competitors) was properly analyzed by the Ninth Circuit under the commercial speech test of *Central Hudson*, where USDA argued below that *Central Hudson* was the correct test; and only after failing to satisfy the *Central Hudson* test did USDA then argue, for the first time, in its petition for re-hearing *en banc* (which was summarily unanimously denied) that *Central Hudson* was not the proper test?
2. Should this Court review whether USDA's forcing of only California growers to fund a "generic" advertising program was properly analyzed by the unanimous Ninth Circuit under the commercial speech test of *Central Hudson* where (a) the *Central Hudson* test has been consistently applied by all circuits previously addressing this and other commercial speech issues, and (b) USDA previously admitted to the Ninth Circuit that *Central Hudson* was the proper test?
3. Should this Court review whether forcing only California nectarine, peach and plum growers to fund a "generic" advertising program (without brand credits) implicates the growers' constitutionally protected rights (in relation to USDA's purported aim of increasing the total market) where the underlying trial record: (a) established that growers were forced to fund an advertising program run by their competitors that promoted their competitors' varieties (to the detriment of the growers' own varieties and own branded advertising programs); and (b) the trial record did not demonstrate any increase in total market nor any increase in net per acre financial return to the growers?
4. Based on the trial record developed below, is it constitutionally permissible for USDA to force only California's nectarine, peach, and plum growers to fund a nationwide "generic" advertising program, when all other states' growers who compete by producing the same fruit (in approximately 30 other states) receive a "free ride" by avoiding all forced advertising assessments?

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On Petition For Writ Of Certiorari To The
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STATEMENT

The petition for certiorari follows the Ninth Circuit Court of Appeals' invalidation of the compelled funding of the "generic" advertising program imposed by the Secretary of Agriculture on "handlers" (i.e., growers, processors, and sellers) of peaches, plums, and nectarines grown in essentially four counties in the San Joaquin Valley of

Central California.¹ Respondents grow, process, and sell peaches, plums and nectarines. App. to Pet. for Cert. p. 3a.

Under the AMAA the United States Department of Agriculture ("USDA") assesses approximately \$.18-\$.20 on every box of peaches, plums, and nectarines packed in the San Joaquin Valley. The assessments total approximately \$10-12 million annually. Approximately 53 percent of these assessments fund the "generic" advertising program. App. to Pet. for Cert. at p. 8a n. 3. See, 7 C.F.R. §§ 916.45, 917.39.² Commodity committees consisting of respondents' competitors, appointed by the Secretary of Agriculture ("Secretary"), control and carry out the generic advertising program. App. to Pet. for Cert. pp. 4a, 8a. The committees control the nature and content of the advertising messages projected. *Id.* p. 8a. The Ninth Circuit found the advertising program failed the commercial speech test articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Id.* p. 21a.

This matter began when respondents Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions with USDA pursuant to 7 U.S.C. Section 608c(15)(A). The first petition, filed in 1987, alleged certain California nectarine, plum, and peach maturity regulations were neither lawfully promulgated nor lawfully enforced. After a nine-day evidentiary hearing, USDA Administrative Law Judge Dorothea A. Baker ruled in favor of Wileman/Kash.³

¹ The Secretary imposes the program under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA") 7 U.S.C. § 601, *et seq.*

² The federal plum marketing order was terminated by the Secretary of Agriculture in 1991. App. to Pet. for Cert. p. 5a n. 1.

³ ALJ Baker issued her 401 page Decision and Order on May 18, 1989.

Wileman/Kash filed a second petition in June 1988. That petition challenged the assessment funded "generic" advertising program at issue here. The petition alleged the program violated freedom of association under *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977) and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and freedom of speech under *Central Hudson*, 447 U.S. 557. After an evidentiary hearing encompassing approximately 20 days of testimony, ALJ Baker ruled in favor of Wileman/Kash, and in dicta analyzed the "generic" advertising program finding it unconstitutional under *Central Hudson* and *Frame*. App. to Opp. to Pet. for Cert. pp. 362a-393a.⁴

Beginning with the 1987 harvest season Wileman/Kash paid the assessments into an attorney-client trust account maintained by their attorney of record. Despite Wileman/Kash's attempts to work with USDA, the U.S. Attorney's office filed collection actions in the United States District Court, Eastern District of California. App. to Pet. for Cert. p. 7a. District Court Judge Edward D. Price ordered the assessments, and all assessments for future harvest seasons, retained in trust pending final disposition of the case.⁵ App. to Pet. for Cert. p. 7a.

Meanwhile, respondents Gerawan Farming, Inc., Asakawa Farms, Inc., Chiamori Farms, Inc., Phillips Farms, Inc., Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms filed

⁴ ALJ Baker issued her Decision and Order on May 29, 1991. It is reproduced at App. to Opp. pp. 17a-401a.

⁵ More than \$5,000,000.00 in advertising and inspection assessments is in trust with the Clerk of the United States District Court, Eastern District of California.

administrative petitions raising the same issues as the Wileman/Kash petitions.

The Secretary of Agriculture's Judicial Officer subsequently issued decisions overruling both of ALJ Baker's decisions on all issues.⁶ See, App. to Pet. for Cert. p. 5a, 7a. Respondents filed complaints with the District Court seeking review of agency action pursuant to 7 U.S.C. Section 608c(15)(B). The parties stipulated that all respondents would rise or fall based on the District Court decision on the Wileman/Kash Complaint.

The District Court heard respondents' challenges on cross-motions for summary judgment. USDA argued it satisfied the *Central Hudson* test, claiming a substantial governmental interest in the promotion of tree fruit to justify the infringement of respondents' First Amendment free speech rights. USDA argued the District Court should *not* apply *Abood*, 431 U.S. 209 and its progeny, contending that line of cases did not apply to a government-mandated, commercial advertising program. App. to Opp. p. 2a.

On January 27, 1993, the District Court ruled in favor of USDA on all issues. The District Court concluded that although the forced "generic" advertising program "implicates the First Amendment rights of handlers forced to participate, [it] was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary

⁶No matter the issues involved, the Judicial Officer always rules in favor of the Secretary of Agriculture. See, *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986); *Hutto Stockyard v. U.S. Department of Agriculture*, 903 F.2d 299, 304-305 (4th Cir. 1990); *Parchmann v. USDA*, 852 F.2d 858, 866 (6th Cir. 1988).

to achieve the stated goal."⁷ App. to Pet. for Cert. pp. 91a-92a.

Respondents appealed to the Ninth Circuit. In opposition to respondents' appellate brief, USDA argued that respondents' First Amendment free speech challenge must be analyzed under *Central Hudson*, 447 U.S. 557. App. to Opp. 5a. The Ninth Circuit agreed, reasoning that the compelled speech was commercial speech subject to analysis under *Central Hudson*. App. to Pet. for Cert. p. 15a, 16a n. 7. The Ninth Circuit, however, overruled the district court, ruling that, on the record before the court, USDA failed to establish that the program directly advanced USDA's interest or that the program was sufficiently narrowly tailored to achieve USDA's asserted objective. App. to Pet. for Cert. pp. 17a-21a.

After losing, USDA petitioned for rehearing and requested rehearing *en banc*. In its petition for rehearing, USDA shifted position and argued that the Ninth Circuit should not have applied the *Central Hudson* test in analyzing respondents' First Amendment claims. The Court of Appeals denied USDA's petition for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE PETITION

A. USDA Conceded *Central Hudson* Was The Appropriate Test And Cannot Seek Review Claiming *Central Hudson* Was The Wrong Test

USDA untenably seeks review arguing the Ninth Circuit should not have applied the *Central Hudson*, 447 U.S. 557, commercial speech test, but instead should have applied *Abood v. Detroit Board of Education*, 431 U.S. 209 and its

⁷Upon issuing its decision, the District Court consolidated the remaining 14 respondents with Wileman/Kash for purposes of judgment and appeal.

progeny. Before the District Court and the Ninth Circuit Court of Appeals USDA argued the opposite—that *Central Hudson* controlled and *Abood* did not apply to government-mandated advertising programs. USDA cannot now seek review of an issue it conceded below.⁸

“Only in exceptional cases will this Court review a question not raised in the court below.” *Lawn v. United States*, 355 U.S. 339, 362 (1958); *Accord, Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Abickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970). The Court will not consider a question in a petition when the opinion below reveals the Court of Appeals did not address the question. *Patrick v. Burget*, 486 U.S. 94, 100 n. 5 (1988). A claim that a different constitutional standard applies should not be heard by this Court when the parties have litigated below for years based on another standard. *Heller v. Samuel Doe*, ____ U.S. ____, 113 S.Ct. 2637, 2642 (1993) (Court would not hear respondent’s claim that constitutionality of statutes should be determined by heightened scrutiny when the parties litigated below for years on theory of rational basis test).

Here, since 1988 the parties have litigated whether USDA’s “generic” advertising survives *Central Hudson*’s commercial speech test. Most important, USDA argued below the opposite of what it argues in its petition, and the Ninth Circuit did not address the question now pressed by

⁸ “[The Court’s] decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition.” *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). “Non jurisdictional defects of this sort should be brought to [the Court’s] attention no later than in respondent’s brief in opposition to the petition for certiorari; if not, [the Court considers] it within [its] discretion to deem the defect waived.” *Id.*

USDA. For example, in the district court USDA argued that it met the *Central Hudson* test and contended that:

“the ‘compelled association’ line of cases that begin with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply has no applicability to a government-mandated, commercial advertising program such as this.”

App. to Opp. p. 2a (italics added).⁹

In the Ninth Circuit USDA argued that the *Central Hudson* test applied:

“[A]s the district court correctly noted, ‘the only goal of the speech . . . is to convince consumers to buy growers’ fruit. It is purely commercial speech.’ [Citations omitted.] As such it must be analyzed under the three part test of *Central Hudson Gas and Electric v. Public Service Comm’n. of NY*, 447 U.S. 557, 566 (1980).”

App. to Opp. p. 5a (italics added).

⁹ Similarly, USDA’s Judicial Officer (“JO”) said *Abood* did not apply, claiming assessments were not used for ideological expenditures. See, App. to Pet. for Cert. pp. 197a, 200a. The JO said the only speech conducted is commercial speech (See, App. to Petition for Cert. pp. 188a, 190a). He went on to claim the use of assessments to fund the speech represented a reasonable fit between Congress’ desired ends and the means chosen to accomplish those ends within the meaning of the commercial speech test as explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). See, App. to Pet. for Cert. pp. 191a-194a.

After losing before the Ninth Circuit panel, USDA petitioned in August 1995 for a rehearing *en banc*. USDA's petition for rehearing conclusively reveals the shift in position it now undertakes trying to obtain review:

"[b]efore the panel, we were bound by the Court's decision in *Cal-Almond*, applying the commercial speech test to a generic advertising program under a different marketing order. Accordingly, in our brief we analyzed the peach and nectarine generic advertising programs [in this case] under *Central Hudson*, arguing that those programs were factually distinguished from the almond program. In this petition we urge the Court *en banc* to apply what we believe is the correct constitutional test."

App. to Opp. p. 8a n. 2 (italics added).

The Ninth Circuit did not order respondents to file a response (see, Fed. R. App. P. 35; 9th Cir. R. App. P. 35-2), denied the petition for rehearing, and rejected the request for rehearing *en banc*.¹⁰ App. to Pet. for Cert. pp. 38a-39a. USDA's argument that *Central Hudson* has no applicability was neither fully briefed nor argued in the Court of Appeals. The Court of Appeal's opinion did not pass on the question. See, App. to Pet. for Cert. pp. 15a-21a.

USDA's claim that a different line of cases governs the commercial speech here is untenable. USDA previously conceded *Central Hudson* applied, and USDA posits no exceptional circumstances otherwise warranting review. The Petition should be denied.

¹⁰A party in the appellate court, including the government, cannot shift its position on a petition for rehearing when the party has conceded a position during appellate litigation. *United States of America v. Smith*, 781 F.2d 184, 185 (10th Cir. 1986); accord, *Mitchell v. Greenough*, 100 F.2d 1006 (9th Cir. 1939) ("A party cannot on petition for a rehearing shift his position.")

B. *Central Hudson* Applies To USDA's Compelled Funding of Commercial Speech Because The Level Of Scrutiny Applied To Compelled Speech Is Determined By The Nature Of The Speech Compelled

Because USDA failed the *Central Hudson* test, USDA now seeks to use *Aboud v. Detroit Board of Education*, 431 U.S. 209 and its progeny like a Procrustean bed in an attempt to make the compelled funding of commercial speech "germane" to the statutory scheme, justified by an "important" government interest. USDA argues this test applies because USDA "merely" compels the funding of the speech and does not restrict or regulate respondents' speech. See, Pct. for Cert. pp. 14-18. USDA's argument fails at its inception.

1. The Circuits Agree That *Central Hudson* Applies To USDA's Forced Funding Of Commercial Advertising Programs

The Ninth and Third Circuits agree that when USDA compels the funding of commercial advertising programs the applicable test is the commercial speech test articulated in *Central Hudson*. See, e.g., *Cal-Almond v. Department of Agriculture*, 14 F.3d 429, 434-436 (9th Cir. 1993); *United States v. Frame*, 885 F.2d 1119, 1134 n. 12 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

2. This Court's Decisions Hold That The Character Of The Speech Compelled Determines The Level Of First Amendment Scrutiny

In *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S.Ct. 2667, 2677 (1988), this Court held that the level of constitutional scrutiny given to government action

compelling speech is determined by the nature of the speech compelled and the effect of the compelled statements:

"Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statements thereon."

Riley, 108 S.Ct. at p. 2677 (italics added) (commercial speech inextricably intertwined with fully protected speech thereby requiring strict scrutiny).¹¹

By parity of reasoning, when USDA compels commercial speech the scrutiny required is the commercial speech test. USDA cannot avoid this scrutiny by talismanic reliance on the fact that it compels funding of the speech at issue. In *Abood*, 431 U.S. 209, 234-235, in the context of fully protected speech, the Court rejected reasoning that compelling the funding of protected activity instead of proscribing the activity is constitutionally significant:

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.¹² For at the heart of the First Amendment is the notion that an individual should be

¹¹ See also, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474 (1989) (compelled commercial speech not inextricably intertwined with fully protected speech).

¹² "This view has long been held. James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical'." I. Brant, James Madison: The Nationalist 354 (1948)."

free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. [Citations omitted]."

Id. p. 234-235.

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2338, 2347 (1995) the Court explained that:

" 'Since all speech inherently involves choices of what to say and what to leave unsaid,' [Citation omitted], one important manifestation of the principal of free speech is that one who chooses to speak may also decide 'what not to say,' [Citation omitted]. Although the state may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information' [Citations omitted], outside that context it may not compel affirmance of a belief with which the speaker disagrees [Citation omitted]. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . [Citations omitted]."

Hurley, 115 S.Ct. at 2347.

In accord with this fundamental rubric, the appellate court in *United States v. Frame*, 885 F.2d at 1132 reasoned that for purposes of the Constitution, compelling funding of expression is equivalent to decreeing that expression. Likewise, in *Cal-Almond Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, the appellate court squarely rejected USDA's argument that it did not significantly implicate First Amendment free speech rights by forcing the growers to contribute assessments for advertising.

Here, respondents are compelled by USDA to provide financial support for particular advertising messages associated with a particular group — the peach, plum and nectarine committees. See, App. to Pet. for Cert. p. 15a. Respondents are forced to speak, and forced to pay for, messages which do not project what respondents want to say.¹³ In addition, respondents' ability to engage in protected commercial speech is severely diminished because of USDA's capture of substantial sums of respondents' money they could otherwise use to engage in their own directed advertising. See, App. to Pet. for Cert. pp. 15a-21a.

USDA's contention that diminishment of respondents' ability to advertise could still occur if the assessments were expended for purposes unrelated to expression misses the point. See, Pet. p. 16 n. 9. Substantial amounts of growers' assessments *are* spent by USDA for compelled expression. Wileman/Kash, for example, are required to contribute \$50,000 or more in some years toward "generic" advertising. App. to Pet. for Cert. p. 18a. As the Ninth Circuit found, this is a significant amount of money impacting respondents' ability to engage in protected speech. App. to Pet. for Cert. p. 18a. Cumulatively, respondents pay over one million dollars in assessments each harvest season. Although not noted by the Ninth Circuit, respondent Gerawan Farming, Inc., for example, averages between \$600,000 and \$700,000 in tree fruit assessments each harvest season — of which in excess of 50 percent goes to fund "generic" advertising. See, App. to Opp. p. 355a. As a result, promotional material respondents otherwise would like to create and distribute is substantially curtailed; their ability to project the message they desire necessarily becomes less effective. App. to Opp. p. 364a, 369a-372a.

¹³The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

By extracting the assessments for advertising, USDA fails to leave respondents with constitutionally satisfactory alternate channels for commercial speech.¹⁴ In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614 (1977) the Court found the government's assertion that other avenues of communication remained open failed because the other avenues available involved more cost, less autonomy, were less likely to reach persons not deliberately seeking sales information, and may have been less effective media. *Id.*, at 97 S.Ct. at 1618.

Respondents' ability to speak as they prefer necessarily involves more cost, less autonomy, and reduces their ability to reach persons not deliberately seeking sales information about specific varieties of fruit, due to the restrictions placed on respondents' budgets by being forced to contribute to the "generic" message. Compare, *Turner Broadcasting System, Inc. v. FCC*, ___ U.S. ___, 114 S.Ct. 2445 (1994) (requirement to set aside channels for local broadcasters reduces number of channels over which operators exercise control and makes it more difficult to compete on remaining channels).

Additionally, the regulations at issue severely hamper the free flow of commercial information to the public. In *Linmark*, 431 U.S. 85 after finding the township's regulation unconstitutional as to the speaker, the Court also found the regulation unconstitutionally limited the free flow of information to the listeners. The same can be said here. Important particularized advertising or promotion information fails to reach the listeners' ears due to USDA's diminishment of respondents' ability to advertise.

¹⁴The speaker is in the best position to determine the most economical avenue for dispensing information, and government, through regulation, compelling a more costly avenue cannot escape First Amendment scrutiny. *Meyer v. Grant* 486 U.S. 414, 424 (1988).

In sum, compelling respondents to fund advertising does not dilute the constitutional scrutiny afforded impingement on commercial speech. By forcing respondents to fund "generic" advertising and correspondingly foreclosing or severely diminishing respondents' ability to engage in protected commercial expression, USDA triggers the scrutiny of the *Central Hudson* test.

C. USDA's Claim That The Program Survives Scrutiny Under *Central Hudson* Purportedly Because Generic Advertising Aims To Increase Total Market, Not Individualized Shares of The Market, Fails Because The Program Forces Respondents To Pay For Advertising Their Competitors' Particular Varieties

USDA contends generic advertising aims to increase the overall market while individualized advertising aims to give the particular advertiser a bigger share of the existing market. USDA reasons that because this is so, the Ninth Circuit erred in finding the program failed the second prong of the test in *Central Hudson*, 477 U.S. 557. See, Pet. for Cert. p. 20.

USDA begins with a false premise. The purported aim USDA presses, assuming *arguendo* the aim is an appropriate one,¹⁵ ignores the substantial contrary evidence adduced

¹⁵Currently, in both the House and Senate, Bills to reform and extend agricultural programs are under consideration. See, S. 1541, 104th Cong., 2d Sess. (1996); H.R. 2973, 104th Cong. 2d. Sess. (1996). These Bills include language stating that "generic" advertising of agricultural commodities increases total market. See, S. 1541, proposed Section 961, and H.R. 2973, proposed Section 602. At the time of printing this brief, the last action on S. 1541 was March 12, 1996 when the Senate began consideration of the Bill, taking action on amendments, and the last action on H.R. 2973 was February 28, 1996 when the Bill was referred to committee. See, LEXIS, Genfed library, BLTRCK file. The possibility that these Bills could become law is another reason for this Court to deny the petition. It would be imprudent and a waste of

demonstrating that the "generic" advertising program forced respondents to pay for advertising *particular exclusive varieties* owned by their competitors.

For example, USDA compelled respondents to advertise a proprietary variety owned by a member of the Nectarine Administration Committee. See, App. to Pet. for Cert. p. 15a n. 6. The manager of the California Tree Fruit Agreement (an organization funded by assessment money to administer the marketing orders) testified at an administrative hearing (on a petition brought by respondent Gerawan Farming, Inc.) that the "generic" advertising assessments levied were expended solely on "generic" advertising and no specific variety was promoted through the "generic" advertising program. One week after the manager testified, however, the 1989 "Promotional Chart" was distributed throughout the nation, which included the specific promotion of the "Red Jim" nectarine — a commodity committee member's exclusive proprietary variety. App. to Pet. for Cert. p. 15a n. 6; App. to Opp. p. 349a. Proprietary varieties of others cannot lawfully be planted or sold by respondents.

Respondent Ray Gerawan testified that the Red Jim nectarine directly competes with his varieties. Gerawan testified that to directly compete with the Red Jim nectarine, perhaps one of the most popular varieties sold, he must expend additional money and effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the commodity committee is spending Gerawan's assessments to directly promote his competitor's variety. See, App. to Opp. pp. 349a.

judicial resources to hear this case when the question could be recast by legislative action.

As Mr. Gerawan testified, the "generic" advertising program:

"... is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produced... It is proven that free enterprise and private industry is the essence of this whole thing.

... I am interested in advertising... my label. I am not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern... If growers want to form their own co-ops and they want to be competitive... then God bless them, go for it... It is not a question whether CTFA is effective or not effective for anybody else. They are not effective for me, they are a hinderance to me. I am not here to judge what they do for somebody else."

App. to Opp. p. 350a-351a.

Mr. Gerawan (and the other respondents) understandably objects to the commodity committees' use of in excess of 50 percent of his \$660,000.00 in yearly assessments on a program that directly promotes his competitor's fruit. See, App. to Opp. p. 350a.

In addition, the "generic" advertising program pushes a particularized message that red nectarines are better than other varieties. App. to Pet. for Cert. p. 151 n. 6. This is a broader based promotion of the varieties of respondents' competitors. Requiring respondents to pay for an advertising program that promotes red varieties (of respondents' competitors, including the committee members, to the potential detriment of the yellow varieties grown by respondents)

cannot be said to promote "total market" as claimed by USDA. Moreover, testimony established that the committees' "generic" advertising is actually advertising a selection of the top 15 varieties. See, App. to Opp. p. 333a. This is not "generic" advertising.¹⁶ Instead, this is advertising particular varieties selected by committee members who are in direct competition with respondents. Thus, USDA's claim that the "generic" advertising program increases the "total market" is contrary to the evidence adduced in this case. See, App. to Pet. for Cert. p. 15a n. 6.

Next, even in relation to any true "generic" advertising, USDA's argument fails. USDA's appointed committee chairperson testified that although the industry pays more each year for advertising, the growers' economic position has not improved. App. to Pet. for Cert. p. 19a. USDA failed to substantiate that the generic advertising program is better at increasing consumption than individualized advertising. App. to Pet. for Cert. p. 20a. USDA asked the Ninth Circuit to accept mere speculation and conjecture as sufficient to satisfy its *Central Hudson* burden of demonstrating that the regulation in question directly advanced the asserted governmental interest. See, e.g., *Rubin v. Coors Brewing Co.* — U.S. —, 115 S.Ct. 1585, 1592 (1995) (Government carries burden of showing that the challenged regulation advances the government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture.").

USDA contends the Ninth Circuit "erred" in pointing out that the generic advertising program could, as an alternative,

¹⁶"Generic" means, among other things, "1a: relating or applied to or descriptive of all members of a genus, species, class or group: common to or characteristic of a whole group or class: typifying or subsuming: not specific or individual... b: ... NONPROPRIETARY." Webster's Third New International Dictionary (Philip Babcock and Merriam-Webster Eds. 1993).

allow handlers credit against their assessments for advertising their own brands. According to USDA "the advertising of individual brands is not necessarily as affective in promoting overall demand for product as is the generic advertising of that product." See, Pet. for Cert. p. 20 n. 12. This is simply the inverse of the assertion which the Ninth Circuit found USDA failed to substantiate. See, App. to Pet for Cert. p. 20a.

Moreover, USDA's refusal to allow credits against assessments to handlers that advertise their own brands is also based on the premise that the *content* of individual advertising is disfavored. This undercuts USDA's contention that the program survives *Central Hudson*. USDA expressly refuses to provide credits for individualized advertising, which arguably reduces the burden on respondents' speech, because USDA objects to the content of individualized advertising as a means of market promotion.

This Court's precedents, however, "... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. [Citation omitted]." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S.Ct. 2445, 2459. "[T]he law ... is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. at 2350. "[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say) [Citation omitted]." *Turner Broadcasting*, ___ U.S. ___, 114 S.Ct. at 2467. USDA impermissibly burdens respondents' ability to engage in their own advertising as discussed above and refuses credit for such

advertising, because USDA prefers the substance of what the favored speakers — the commodity committees — have to say over the substance of what the disfavored speakers — respondents — have to say. Compare, *Buckley v. Valeo*, 424 U.S. 1, 48-49 n. 55 (1976) (government limit on individual spending to support or oppose candidate could not be justified by claim purpose is to equalize relative ability of groups and individuals to influence elections because government cannot abridge rights of some to enhance relative voice of others). Accordingly, USDA's argument collapses from its own weight.

D. Even Under The Test Urged In The Petition, USDA Fails To Justify Its Impingement On Respondents' First Amendment Rights

1. The *Central Hudson* Test And The Test Urged By USDA Are Intermediate Scrutiny And USDA's Program Fails Intermediate Scrutiny

Beyond failing *Central Hudson*, even under the test now urged in the petition USDA fails to sufficiently justify its impingement on respondents' First Amendment rights. USDA's petition is premised on the mistaken notion USDA would prevail under the test it now urges; however, there is little, if any, difference between USDA's burden under *Central Hudson* and the test it urges in its petition — both require intermediate scrutiny.

A purview of cases shows the substantively similar articulations of the intermediate scrutiny standard: "The lesson of *Abood* ... is that the government may compel an individual to subsidize non-governmental speech when such compulsion accomplishes the 'government's vital policy interest.' [Citation omitted]." *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992). "The question here is whether [forced funded media] advances an important ... purpose in a narrowly tailored manner." *Id.*; See also, *Carrol*

v. Blinken, 957 F.2d 991, 999 (2nd Cir. 1992) (Content-neutral University regulation giving student activities fees to fund speech and activities of organizations affiliated with University must promote "substantial government interest that would be achieved less effectively absent the regulation."); Compare, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (There is little difference, if any, between time, place, manner test, and the test in *U.S. v. O'Brien*, 391 U.S. 367 (1968) for regulation of conduct with incidental effect on speech); *Turner Broadcasting System, Inc. v. FCC*, ___ U.S. ___, 114 S.Ct. 2445, 2459 (intermediate scrutiny applicable to content-neutral restrictions that impose incidental burden on speech). Because USDA failed *Central Hudson*, USDA failed intermediate scrutiny — no matter how the test is identified.

2. USDA's Forced "Generic" Advertising Program Was Neither Germane To USDA's Purported Aim Nor Justified By An Important Interest

Even if there is a meaningful, fundamental distinction between the tests, USDA still cannot prevail because of the program's impermissible effect on respondents' competitive abilities. For example, when union dues expenditures implicate the affected individuals' competitive advantages and abilities against their profession as a whole, the Court has invalidated the expenditures. For when the challenged activities "relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to finance support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 520 (1991).

Similarly, here, USDA compels respondents to pay for speech proposing a commercial transaction directly concerning the commodities of respondents' competitors.¹⁷ Such advertising is neither "germane" to USDA's purported aim nor justifiable by an "important" interest.

E. No Conflict Exists Between The Ninth Circuit's Decision And The Third Circuit's Decision In *U.S. v. Frame*

USDA's argument that a conflict exists between the Third and Ninth Circuits is misconceived. USDA claims the Ninth Circuit's decision here, and the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 "cannot be squared." Pet. for Cert. p. 21. USDA is wrong. The Courts reached different results based on the underlying factual records — not a misapplication of applicable law.

Unlike the lack of a record here, the Third Circuit found the beef promotion program withstood First Amendment scrutiny based upon a significant congressional record. The government's interest in the preservation of the national economy outweighed a cattleman's right to be free from compelled association. *U.S. v. Frame*, 885 F.2d at 1134, n. 12. In *Frame*, Congress expressly found the beef industry to be on the verge of crumbling which Congress believed would effectively destroy the American way of life. The beef

¹⁷ Some thirty-three states commercially handle peaches and twenty-eight handle nectarines. App. to Pet for Cert. p. 21a. Despite this, USDA treats respondents and other handlers in California different from handlers in those states by assessing only California handlers (in what amounts to four counties) to pay for and disseminate the advertising nationally. Respondents not only raised this disparate treatment as a violation of equal protection, but also argued that such disparate treatment does not represent a reasonable ends/means fit under *Central Hudson*. The Ninth Circuit did not address the equal protection issue but did find that this disparate treatment contributed to the failure of the programs to be sufficiently narrowly tailored under *Central Hudson*. See, App. to Pet. for Cert. pp. 20a-21a.

industry and Congress decided to embark upon an advertising program. Because Congress envisioned the collapse of our nation's economic base without the implementation of a beef promotion program, the court found a "compelling governmental interest sufficient to overcome free speech and associational freedoms within the cattle industry."

The factual scenario in this case is not on equal footing. No economic crisis in the tree fruit industry exists. California plum growers and handlers did not go broke because of not advertising.¹⁸ No in-depth Congressional investigation supported the passage of 7 U.S.C. Section 608c(6)(I) providing the Secretary the authority, *in his discretion*, to implement various advertising programs. No evidence was proffered that the national economy would collapse without commercials imploring consumers to "eat California fruit." At best, the Secretary's comments at the time he proposed the creation of a forced "generic" advertising program on the plum industry indicated a desire to point out the attractiveness of the product:

"The record show that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space in retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, *plums should benefit from a promotional program which offers the retailer an attractive quality product* which the industry helps sell with an advertising and promotion campaign."

36 Fed. Reg. 8736, May 2, 1971 (italics added).

¹⁸The federal plum marketing order was discontinued before the 1991 harvest season. As a result, no forced "generic" advertising took place during the 1991 through 1993 harvest seasons. Instead, the growers formed a voluntary program. In 1994, a state marketing order was put into place for regulating maturity and advertising.

The Secretary of Agriculture's desire to "offer the retailer an attractive quality product" in competing with other fruits for retail shelf space cannot be equated with a compelling interest to preserve our national economy.

The decision to impose mandatory assessments *only* on California growers so that the retailer may present an attractive quality product mocks the First Amendment protection accorded the decision of what not to say. See, e.g., *U.S. v. Frame*, 885 F.2d at 1181-1182 (Sloviter J. Dissenting) (government interest neither compelling nor substantial when advertising messages compelled represent economic interest of one segment of population).

Moreover, the Third Circuit in *Frame* acknowledged that the *Central Hudson* standard was the applicable test to apply to Frame's free speech claim. However, as the majority in *Frame* was "convinced that the government's interest in preventing the collapse of a vital sector of the national economy qualifies as a compelling state interest," and the government interest outweighed the intrusion on Frame's speech and association rights, the *Central Hudson* standard was satisfied. *U.S. v. Frame* 885 F.2d at 1134 n. 12. On the other hand, here the Ninth Circuit did not equate the governmental interest in a forced "generic" tree fruit advertising program to that of "preventing the collapse of a vital sector of the national economy." As such, the Ninth Circuit did not find it necessary to apply the compelling state interest test to the infringement upon respondents' associational freedoms. Instead, the Court found the less restrictive *Central Hudson* test for commercial speech controlling.¹⁹

¹⁹USDA mistakenly refers to the Agricultural Act of 1954, H.R. Report No. 1927, 83d Cong., 2d Sess. 4, as the foundation to support that a compelling governmental interest exists to protect and improve the farm economy. Pet. for Cert. p. 18-19. A review of the Agricultural Act clearly establishes that the Act had absolutely nothing to do with any congressional authorization to support a forced "generic" advertising

The Ninth Circuit here had no substantial congressional record to support the forced "generic" advertising program as did the Third Circuit in *Frame*. There is no evidence that the forced "generic" advertising program benefitted respondents' sales and/or profit margins. App. to Pet. for Cert. pp. 17a-18a; USDA presented no evidence that it had conducted any studies to determine whether the forced "generic" advertising program worked to the growers' benefit. *Id.*, p. 19a; USDA presented no evidence that tree fruit growers in other states do not reap the same, or greater, benefit from the "free ride" they receive from the "generic" advertising program — a program paid for solely with California growers' assessment monies. *Id.*, p. 21a.

The Ninth Circuit found from the extensive hearing record that respondents were being forced to support an advertising program that promotes the "Red Jim" nectarine — a proprietary variety of one of the committee members; forced to associate with "generic" advertising messages with which respondents disagree;²⁰ respondents' own distinctive

program. The Agricultural Act, similar to the congressional findings in *Frame*, sought to preserve the national economy, which respondents do not dispute is of substantial interest to the government. However, the Agricultural Act must not be "bootstrapped" into expanding USDA's interest in promoting California nectarines, peaches and plums. The Agricultural Act dealt solely with extending, for a year, price support programs for wheat, corn, cotton, rice and peanuts following the Korean War. Not once within that Act are the words nectarine, plum or peach referenced. Not once within that Act is the word advertising mentioned.

²⁰The "generic" advertising program implies by its very nature that "red is better" and "all California tree fruit is the same." Many respondents grow yellow varieties of nectarines and peaches. A "generic" advertising program that promotes the red varieties to the exclusion of the yellow varieties not only does not benefit the growers of the yellow varieties, but respondents believe the yellow varieties to be of superior quality and taste than the red varieties; respondents do not want to be clumped into a "generic" advertising program promoting *all* California tree fruit being of equal quality. Respondents believe their

advertising efforts are being hampered by the compelled funding of the "generic" advertising program.²¹

In addition, California cattlemen are not singled out, as California tree fruit growers are, to finance and subsidize a national promotion program for an entire industry. The discriminatory impact of the "generic" advertising program as applied to California tree fruit handlers certainly cannot be equated with a rational "fit" between the asserted governmental interest and the regulations at issue.²² For example, the beef promotion program is nationwide. For every head of cattle sold in America, or imported into America, a \$1.00 assessment, *set by Congress*, is applied to the beef promotion program. On the other hand, within the California "generic" advertising program, the assessment level is left to the Secretary's discretion and, historically, the cost of advertis-

fruit to be of superior quality. To be grouped with inferior fruit detracts from their own varieties. App. to Pet. for Cert. at p. 15a.

²¹The Court found that respondent Kash, Inc., would prefer to conduct in-store promotion to sell its product; respondent Gerawan Farming, Inc., would prefer to advertise its own label; etc. App. to Pet. for Cert. at p. 18 a.

²²ALJ Baker, in her administrative decision, points out many factual circumstances differentiating the tree fruit "generic" advertising program from the beef program upheld in *Frame*. For example: (i) Congress mandated advertising within the beef industry. It is discretionary with the Secretary in the tree fruit industry; (ii) the beef program established a standardized assessment rate set by Congress. The tree fruit assessment rate is discretionary with the Secretary; (iii) the beef program has established proscriptions and standards. The tree fruit program is discretionary with the Secretary; (iv) the beef program has substantial governmental oversight. The tree fruit program is left to the discretion of the tree fruit committees; (v) the beef program applies nationwide. The tree fruit program applies only to four counties in the central San Joaquin Valley of California; (vi) the beef program limits spending to strictly advertising beef. The tree fruit program assessments are used for expenditures which the court in *Frame* denounced. See, App. to Opp. pp. 377a-380a.

ing, and accordingly, the assessment rate continues to rise.²³ The assessments also continue to be redirected to the special interests of those sitting on the tree fruit committees.²⁴

USDA also urges that because the Ninth Circuit found the *Cal-Almond* decision largely governed its analysis in this case and because the Court in *Cal-Almond* concluded the generic advertising program for almonds "closely resembled" the program in *Frame*, the *Frame* result must prevail. See, Pet for Cert. p. 24 n. 16. What the *Cal-Almond* Court found was "... a 'publicly identified group' (cattlemen or almond handlers) must contribute money to fund the 'dissemination of a particular message associated with that group'." *Cal-Almond*, 14 F.3d at 435. That is where any resemblance between the programs ends. The Ninth Circuit's analysis here and in *Cal-Almond* is consistent with the Third Circuit's decision in *Frame*. The fact that the *Frame* Court found the underlying beef promotional program record sufficient to uphold that program, while the Ninth Circuit found the underlying records insufficient to uphold the tree fruit and almond programs does not create a conflict within the Circuits.

²³ As noted by the Ninth Circuit, the Chairman of the Management Services Committee testified that "although each year the industry pays more for the same amount of advertising, the growers' economic position has not improved." App. to Pet. for Cert. at p. 19 a.

²⁴ For example, at the January 18, 1996 meeting of the tree fruit Control Committee, employees of the committees, whose salaries are paid by mandated assessments, discussed their concerted efforts to lobby the Solicitor General to file a petition for writ of certiorari in this case; additionally, the Committee members voted on and approved spending up to \$160,000.00 of growers' assessment monies to pay the outstanding bills of a private law firm hired to assist the U.S. Attorney's Office in defending an antitrust action brought against certain members of the tree fruit committees and their employees. App. to Opp. pp. 11a, 12a, 13a, 15a. See also *Wileman Bros. & Elliott, Inc., et al. v. Giannini, et al.* 909 F.2d 332 (9th Cir. 1990).

F. The Ninth Circuit's Decision Will Not Automatically Invalidate The Operation Of Other "Generic" Promotion Programs Funded By Mandatory Assessments, As Alleged By USDA

USDA would have this Court believe that the Ninth Circuit's decision has broad sweeping ramifications on all remaining commodity "generic" advertising programs. This is not so. The Ninth Circuit's decision did not find the Agricultural Marketing Agreement Act unconstitutional. The Court invalidated the forced "generic" advertising program based on the record presented by USDA to the Court. That record "says nothing about whether mandatory, collectively-financed advertising is more effective than advertising undertaken by individual handlers (or even whether generic advertising is better than brand-name advertising);" nor did the record reflect that the "generic" advertising program was sufficiently narrowly tailored to withstand constitutional scrutiny. App. to Pet. for Cert. at pp. 19a-21a.

On the other hand, many existing promotional programs identified in USDA's petition at footnotes 19 and 20 likely have records sufficient to withstand a *Central Hudson* analysis. Those that do not should fall. They unconstitutionally impact growers' ability to market their product as they prefer. The Ninth Circuit concluded that "each handler knows best how to sell his own [commodity]." App. to Pet. for Cert. at p. 18 a.

That does not mean, however, that a generic advertising program cannot work. First, USDA can conduct the macroeconomic and microeconomic studies necessary to establish that "generic" advertising benefits the grower, and that "generic" advertising works better than a grower's individual efforts. Second, as the Ninth Circuit alluded, USDA could allow for credits to tree fruit handlers for their own individualized advertising programs. A brand-specific advertising program would, logically, assist in the sale of tree

fruit equally as well as a "generic" program. App. to Pet. for Cert. at p. 20a.

Respondents oppose the expenditure of their monies to promote a "generic" advertising program that they ideologically, philosophically, morally, economically and commercially oppose. If tree fruit growers feel the need to advertise, so be it, let them advertise in any manner they desire. They can form cooperatives to promote their particular product. Orange juice has no mandated advertising program, however, Sunkist formed a cooperative to advertise its product — without infringing other growers' constitutional freedoms. Sun-Maid and OceanSpray have done the same thing. By creating their own cooperatives for the purposes of advertising their products, they are allowed to create promotional material that will reach the companies and/or individuals with the message they wish to convey. They are not forced to pay for promotional programs that convey their competitors' specialized or preferred message.

Respondents are forced to spread the message "eat California tree fruit." If USDA wants that message spread, the First Amendment precludes respondents from being compelled to spread it. If one would ask any businessperson, no matter the products sold or the service provided, if he or she believes that it would not infringe their First Amendment rights for the government to compel them to advertise their product, and to compel them to advertise it in a certain method and manner, and that they were to use their own money to do it, it is safe to say that not one person questioned would not be abhorred.

The tree fruit industry is extremely competitive, despite the socialistic programs set up under the nectarine, peach and plum marketing orders. Respondents are competing against every other handler in the industry, including the individual committee members who control the advertising program. Respondents can survive by being efficient,

smarter, and developing their own outlets for tree fruit that provide them a special little niche. As a result of respondents being enterprising, they can expect a decent return on their substantial dollar investment in this industry, except when USDA, at the request of the commodity committees, compels respondents to spend valuable capital assets advertising in methods and means that does not increase respondents' market share, does not increase the return on their tree fruit sold, and does not enhance the sales of their tree fruit.

USDA failed to justify its forced "generic" advertising program. The only generic promotion programs which would be impacted by the Ninth Circuit's decisions here and in *Cal-Almond* are those programs which have the same stifling effect on the growers' constitutional freedoms of speech and association. The tree fruit industry is still marketing nectarines, peaches and plums; Blue Diamond is still imploring consumers to "buy just one can a week."

CONCLUSION

USDA has failed to provide this Court with any sound reason why its Petition for Writ of Certiorari should be granted. Respondents respectfully request that this Court deny USDA's petition for Writ of Certiorari.

Respectfully Submitted,

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